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Supreme Court of the United States

October Term, 1917.

No. 701.

Angelo Guerrio,
Petitioner,

v.

United States of America.

PETITIONER'S BRIEF.

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Supreme Court of the United States.

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No. 701.

ANGELO QUERCIA, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITIONER'S BRIEF.

STATEMENT OF THE CASE.

This is a petition for certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit, affirming a conviction of the defendant (the petitioner here) in a criminal case.

The petitioner was indicted with one Joseph Brogna at the September Term of the United States District Court for the District of Massachusetts, to wit, October 21, 1931, for violating the Harrison Narcotic Law (Act of Congress December 17, 1914, as amended). Brogna pleaded guilty and was sentenced to three years' imprisonment. The petitioner stood trial before Lowell, J., and a jury.

The indictment contained two counts, the first count alleging—

> "That Joseph Brogna, of Chelsea in the District of Massachusetts and Angelo Quercia of Somerville, in the District of Massachusetts, on or about the 9th day of September in the year 1931, at Somerville, in the District of Massachusetts, did wilfully, knowingly and

unlawfully sell, dispense and distribute to one John Hesse of Boston in the District of Massachusetts, a compound, manufacture, salt, derivative and preparation of opium, to wit, three ounces, more or less of morphine, said morphine not being sold, dispensed in or from an original package."

The second count is the same, only the sale is alleged as of September 13, 1931, and the quantity is two ounces.

Upon his conviction the defendant was sentenced to a term of five years on each count, said sentences to run consecutively.

One Hesse (R. 3-14), a government narcotic agent, testified in substance that for a month or two prior to the arrest of Brogna and Quercia he had been purchasing drugs from Brogna. About a month and a half after the first purchase from Brogna, Hesse met Brogna by appointment. A dispute as to price arose, and Brogna left. Later on Brogna returned, accompanied by Quercia. A talk was had, during which talk the price of drugs was discussed, and Quercia left, and Brogna returned alone and delivered drugs to Hesse. The transaction was the only one in which Quercia appeared, and no drugs were actually delivered to Hesse in Quercia's presence.

Three other witnesses (R. 14, 15) testified for the government, but added nothing to the story as told by the witness Hesse.

Quercia (R. 15) testified in his own behalf and made a general denial of all the charges.

The record further states (R. 15) the foregoing is all the material evidence.

At the close of the evidence the defendant (now petitioner) presented a motion for a directed verdict (R. 15) and also requests for rulings (R. 16), which were denied, and the defendant duly excepted.

After that, the judge charged the jury (R. 17, 18), and after giving a brief charge on the function of the Court,

reasonable doubt, the indictment being no evidence, he continued as follows:

> "And I rule as a matter of law, Mr. Foreman and gentlemen, if you believe the evidence for the Government you may find him guilty under this indictment. That ruling will be excepted to by the defendant, as I understand, and the question of law thereby arising will be tested out in the upper court; but I rule, if you believe the evidence of Mr. Hesse and the others, you may find this defendant guilty on both counts. It is a question of whom you will believe.
>
> "And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.
>
> "Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.
>
> "I don't think I care to say anything else, Mr. Foreman and gentlemen.
>
> "I will save your exception, Mr. Carroll."

The jury returned a verdict of guilty on both counts, and thereafter the defendant was sentenced to imprisonment in the United States Penitentiary at Atlanta, Georgia, for a term of five years on each of the two counts of the indictment, said sentences to run consecutively, and it was ordered that he be committed until the sentences be performed. The petitioner duly filed a bill of exceptions, which was duly allowed, and thereafter prosecuted a writ of error to the Circuit Court of Appeals for the First Circuit.

The petitioner sought to reverse the conviction on the ground that he was not guilty of the sales set out in the indictment, that his motion for a directed verdict of "not guilty" was denied, that his requests for instructions were refused, and further that the District Judge exceeded his prerogative in commenting on and characterizing the defendant's testimony as "a lie," and also in substance and effect testifying himself as to a matter which nowhere appears in the testimony, and as to which there was no testimony, and which was not in issue, namely, that it was a fact that a person who wiped his hands during his testimony was lying.

The Circuit Court of Appeals, in a two-to-one opinion, the senior judge writing a dissenting opinion, affirmed the conviction.

Opinions Below.

The majority opinion of the Circuit Court of Appeals (R. 22) and the dissenting opinion (R. 24) are not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on the 3d day of January, 1933. The jurisdiction of this Court is invoked under section 20A of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. That a presiding judge in a criminal case has exceeded his prerogative in instructing a jury upon the facts when he makes the following statement during his charge:

> "You may have noticed Mr. Foreman and Gentlemen that he wiped his hands during his testimony. It is rather a curious thing but that is almost always an indication of lying. Why it should be so we don't know, but

that is the fact. I think that every single word that man said except when he agreed with the Government's testimony was a lie."

2. That the presiding judge refused to charge the jury as to the essential elements of the offense charged in the indictment by refusing to give, in form or in substance, instructions seasonably requested by the defendant, or to make any allusion in his charge to the essential elements of the offense charged, which were issues in the case.

ASSIGNMENT OF ERRORS.

1. The Court erred in denying the defendant's motion for a directed verdict of not guilty, as more particularly appears in his bill of exceptions.

2. The Court erred in his charge to the jury in ruling, as a matter of law, that if the jury believed the evidence for the government, they could find the defendant guilty under the indictment.

3. The Court erred in charging the jury as follows:

"Now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie."

4. The Court erred in denying the following requests for rulings:

(1) That upon all the evidence the government has not sustained the burden of proof and the Court should direct the jury to bring in a verdict of not guilty upon all the counts of the indictment.

(2) The government offering no proof that the defendant was a dealer in narcotic drugs or that he was a person of a class of persons required to register and pay a special tax, the jury must find the defendant not guilty of the offenses alleged in all the counts of the indictment.

(3) The government having charged the defendant with selling from an unstamped package and having failed to prove that it was from an unstamped package, the jury must find the defendant not guilty on all the counts of the indictment.

(4) Upon all the evidence the government has not proved that the defendant sold, dispensed, or distributed the morphine alleged in said indictment.

5. To find the defendant guilty on this indictment the government must prove that the defendant

(*a*) Sold the narcotics;
(*b*) Dispensed the narcotics;
(*c*) Distributed the narcotics;

and having failed so to prove, the defendant must be found not guilty.

6. The evidence of the witness Hesse that all Quercia did was to discuss the price of the drug does not warrant the jury in finding that he sold, dispensed, or distributed the drug.

7. The counts specifically charge the defendant with having sold five ounces of morphine not from an original stamped package. The provision of the amended section regarding the penalties for failing to register and pay the tax applies only to those who sell from a stamped package. There being no evidence tending to prove that the morphine alleged to have been sold as charged in counts one and two was in or from an unstamped package, the defendant must be found not guilty.

Argument.

I.

The Charge to the Jury Exceeded Fair Comment.

The charge to the jury (R. 17, 18), which goes far beyond anything in the reported decisions, exceeded fair comment on the defendant's testimony and was highly prejudicial. The judge went far beyond comment on testimony or evidence and went so far as to make a statement that the defendant "wiped his hands during his testimony" and "that is almost always an indication of lying. Why it should be so, we don't know, but that is the fact." See dissenting opinion (R. 25).

This question is raised by the assignment of errors numbered 3 (R. 20) and by the exception to the charge (R. 18).

Probably nothing that can be argued by the petitioner can add much to what was said by the senior judge of the Circuit Court of Appeals of the First Circuit in his dissenting opinion (R. 24, 25), and especially where he says, after quoting the charge, that it "cannot, by any stretch of the imagination, be regarded as a fair, dispassionate statement by a judge to a jury in a criminal case." We quote this short dissenting opinion in full, as follows:

> "Bingham, J. (dissenting):
>
> The instruction of the presiding judge to the jury—'And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he *wiped his hands* during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, *but that is the fact.* I think that every single word that man said, except when he agreed with the Government's testimony, was a lie'—cannot, by any stretch of the imagination, be regarded as a fair, dispassionate statement by a judge to a jury in a crimi-

nal case. Although a presiding judge in the federal court may express his opinion on the facts, if he informs the jury that they are not bound by his opinion if they do not agree with him, nevertheless there is a limit beyond which he cannot go, and I am bound to say that the above instruction was so charged with passion and prejudice that it exceeded the bounds of fair comment, and caused a mistrial.

Furthermore, the instruction, couched as it was, was not only highly prejudicial, so far as it was an expression of opinion, but it contained a statement of fact by the presiding judge of which there was no evidence. He said: 'You may have noticed, Mr. Foreman and gentlemen, that he (the accused) wiped his hands during his testimony * * * that is almost always an *indication of lying.* Why it should be so, we don't know, *but that is the fact.*' In other words, he said: If a witness wipes his hands during his testimony, it is a fact indicative of lying. There was no evidence in the case to this effect. In making this statement the presiding judge was testifying, and his testimony was of that subtle character that was highly prejudicial. It is not the province of a federal judge to testify in his charge—that is not comment on the evidence—and when he does so and his testimony is prejudicial, it will render the trial unfair. That is what happened in this case." (Italics his.)

And to this we cannot add much except to call to the attention of this Court that, although the judge of the District Court stated "*that is the fact,*" he also stated, just before these words: "*Why* it should be so, *we don't know.*" (Italics ours.) And this clearly means that the judge was testifying to something stated by him to be "the fact" as to which he had no knowledge and assumed that the jury had no knowledge. And it is earnestly contended that, under our law, where a defendant is presumed to be innocent until

the jury finds him guilty by evidence which furnishes proof beyond a reasonable doubt, if the presumption of innocence still exists, it is prejudicial and taking away a substantial right for a judge to add his testimony to what he says is a fact, upon which no evidence has been offered.

By emphasizing the last part of Judge Bingham's opinion, the petitioner does not desire to have this Court lose sight of the earlier part of the decision, and the quoted part of the charge:

> "I think that every single word that man said, except when he agreed with the government's testimony, was a lie"—

and Judge Bingham then states that this "cannot, by any stretch of the imagination, be regarded as a fair, dispassionate statement by a judge to a jury in a criminal case." This is emphasized because of some of the decisions hereinafter cited, where judgment was reversed upon expressions in the charge not going anywhere near as far as that in the charge in the case at bar. While the petitioner recognizes that a judge may comment on the evidence, yet the petitioner contends that it cannot be held to be fair and impartial for a judge to say to a jury: "I think every single word that man said, except when he agreed with the government's testimony, was a lie."

The majority opinion of the Circuit Court of Appeals weakly attempts to justify its position by saying that, because the defendant's testimony was not printed in the record, he may very well have deserved the characterization. This is nothing more than an evasion of the issue. It appears to be nothing more than a subterfuge and a desire of the majority of the Court to gloss over an embarrassing situation, as may be seen from the statement of the majority opinion: "It is difficult to conceive of a jury accepting seriously such a standard for determining whether a witness was telling the truth."

The weakness of that statement is apparent, not only from what appears in the charge to the jury set out in the record, but also from the influence of the great weight of the judge, to "whose lightest word the jury, properly enough, gives a great weight." *Hicks* v. *United States, infra.* It is clear from the reading of the judge's charge that he meant that the jury should accept him "seriously," and there is no reason to suppose that the jury did not take him "seriously" and render a verdict accordingly.

We must assume, and the Appellate Court should have assumed, that the jury was "accepting seriously" ever word uttered by the judge in his charge, especially in the light of judicial decisions and express language as to "the great weight which attaches to intimations of opinion from the Judge," to quote the words of Judge Day, afterwards a Justice of the Supreme Court, in *Mullen* v. *United States, infra.*

It is certain that the statement of the trial judge was made with the deliberate intent to influence the jury, because the brief charge dealt only with the generalities of reasonable doubt, the indictment being no evidence against the defendant, and the presumption of innocence. Then the charge, without stating the propositions of law connected with the particular offenses charged in the indictment, and ignoring the defendant's requests for instructions, goes on to deal with the question of the defendant's veracity, and we find these words: "If you believe the evidence for the government you may find him guilty under the indictment . . . It is a question of whom you will believe." And then, feeling that the jury might not believe the government's witness, but might believe the defendant, the judge goes on to give his own expert testimony as to wiping hands being "almost always an indication of lying," although adding in the next sentence: "*Why* it should be so *we don't know but that is the fact.*" If this would not influence the jury, and prejudice the jury against the defendant, then, we submit, that there is nothing that a judge

could say to influence the jury to the prejudice of a defendant who has testified in his own behalf.

And here we have a judge giving expert testimony of the meaning of a gesture or mannerism or idiosyncracy of a witness under the nervous strain of testifying when ten years of his liberty is at stake, that such is a fact indicating lying, although the judge does not know why it should be so, and so tells the jury, and apparently assumes that the jury does not know either. This passes anything in the decided cases.

And it is fundamentally and essentially wrong to have testimony of an alleged "fact" going into the case without an opportunity for cross-examination. Of course there is no such opportunity when the evidence is closed and the testimony of the alleged "fact" comes from the judge in his charge.

The majority opinion also states: "In this case the testimony of the defendant is not printed in the record." The record states at the conclusion of the summary of the testimony of the government witnesses and the defendant: "The foregoing is all the material evidence." The defendant's full testimony by question and answer was unnecessary under Rule 8 of the Supreme Court. The rule was followed as to all the witnesses except government witness Hesse, upon whose testimony the government case was founded, because this was the only witness whose testimony in any way tended to connect the defendant with the offenses charged in the indictment.

The record states (R. 313): "The defendant testified upon his own behalf and made a general denial of all the charges." This is certainly an adequate summary of the substance of the testimony of the defendant under the rule. It would not have added to the force of the record to set forth his testimony in more detail, to say nothing of setting it forth by question and answer. The characterization objected to is chiefly objectionable because of the premise upon which the trial judge based it, namely, that he wiped his hands while

testifying, and therefore was a liar. It was not because of anything the defendant *said* while testifying, so consequently could not have appeared in the record.

The following authorities throw considerable light on how far a trial judge may go in his charge in commenting on evidence.

In England the law is:

> "1. After the close of the reply of the Counsel for the Prosecution the presiding Judge sums up the whole case and the evidence to the jury, gives his direction on the matters in issue and on the points of law applicable to these matters, and may give his opinion on such matters."
>
> Halisbury's Laws of England, vol. 9, at p. 369.

Attention is called to the case of *Rex* v. *Mason* (1932), 18 Cohens' Appeal Reports. In this case the trial Court said: "I invite you to take such and such a course." The Court of Criminal Appeals said, in quashing the conviction: "The idea of inviting a jury is suited rather to an advocate than to a judge."

In *Rex* v. *O'Donnell* (1917), 12 Cohens' Criminal Appeal Reports, 219, the Criminal Court of Appeals refused to quash the verdict on the ground that the presiding judge had not exceeded his authority, holding that a judge in directing a jury is clearly entitled to express his opinions on the facts of the case, provided he leaves the issues of the fact to the jury to determine. A judge apparently is not justified in directing a jury or using in the course of his summing up such language as leads them to think that he is directing them, and that they must find the facts in the way which he indicates.

In the United States we have the following cases:

Hicks v. *United States*, 150 U.S. 442. The defendant had

gone on the witness stand. The judge said that there was a conflict as to the material facts between his statements and the statements of the other witnesses who were telling the truth, and that the jury would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses, etc. In the majority opinion the Court said that the privilege of the defendant to testify in his own behalf "would be a vain one if the judge, to whose lightest word the jury, properly enough gives a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability."

In *Starr* v. *United States*, 153 U.S. 614, it was held "that there were limitations on the power of a Federal Court in commenting on the facts of a case, when instructing a jury, limitations inherent in and implied from the very nature of the judicial office."

In *United States* v. *Breitling*, 20 How. 252, the Court said:

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

In *Mullen* v. *United States*, 106 Fed. 895, Day, C.J., C.C.A. 6th Cir., said:

> "We do not understand the practise in the Federal Court, liberal as it is, to permit such comments outside of the testimony to go to the jury with the great weight

which attaches to intimations of opinion from the judge."

In *Weare* v. *United States*, 1 Fed. (2) 617, 619, in reversing a conviction, the Circuit Court of Appeals said:

"Examination of the language of the court in its instructions in this case leads inevitably to the conclusion that the exceptions and objections to certain parts thereof were well taken. In reading portions of the instructions, it would be difficult to tell whether one were reading the instructions of a court or the argument of a prosecutor. As a sample of their argumentative nature, we quote the following: 'As I recollect it, when these men were put in jail, one of them put in jail that day and the other one the day before, they were searched. Would such things as that match box and that tobacco can escape the observation of the investigating officer? If he had any sense at all, wouldn't he have found those things? They wouldn't have to go into a man's shoes to determine whether he had a match box on his person. If he had it in his shoe, he would have crushed it. They couldn't get that match box in his shoe. That is my view. Would these things have escaped the searching officer when he searched them before they were put in jail that day? Now, they search them when they put them in jail.'

Other remarks were made by the court equally objectionable, which it is not necessary to set out. The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty. It was a palpable attempt to usurp the function of the jury as to fact questions and to impose the will and desire of the court upon it, and to interfere with the independent judgment of the jurors. Under the Constitution one accused of crime is entitled to a determination by a jury of the fact questions involved. The jury can easily be

misled by the court. Its members are sensitive to the opinions of the court, and it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The government provides an officer to argue the case to the jury. That is not a part of the court's duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument. We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion and that they should follow their own judgment."

In *Parker* v. *United States*, 2 Fed. (2) 710, in a prosecution under the Mann Act, in a *per curiam* opinion it is said:

". . . after fairly stating the conflicting claims and having referred to defendant's contention that the girl had followed him to Illinois, [the judge] charged the jury: 'If (that) is a reasonable contention to you, you are warranted in so regarding it; if you think it is an unreasonable contention, then you may or may not give it such consideration as you think proper. To me it is wholly unreasonable. I don't know how this government witness impressed you jurors. She impressed me as being a girl perhaps easily persuaded, being a girl whose environments had been such as that she might fall an easy victim to the persuasions of designing men. Now, that is simply how she impressed me, and you gentlemen are not to be influenced by my impressions concerning her. Personally I would rather believe the girl who had been wronged than the man who would desert his wife and children to wrong her; but that is another impression that is personal to me, and which you are not to regard in any way whatsoever, or for any purpose.'

> Under all the recited circumstances, we are compelled to think this portion of the charge to have the aspect of argument and advocacy beyond the permissible limit."

In *Graham* v. *United States*, 12 Fed. (2) 717, the Court said, in reversing the District Court:

> "It is however of first importance, both to the particular defendant who may be on trial and to the administration of justice generally, that everyone shall recognize that what is said from the bench is the cool and well balanced utterance of an impartial judge, and has in it naught of the heat and partisanship of the advocate."

In *Cook* v. *United States*, 14 Fed. (2) 833, a conviction was reversed where the judge said that "He gave no credence whatever to the statement of the defendant."

In *Cook* v. *United States*, 18 Fed. (2) 50, a retrial of the preceding case, it was said in the charge (p. 51):

> "It is my opinion from this testimony that these darkies told the truth about this matter. I observed this witness Nelson upon the stand, his demeanor and his manner, the partner of Mr. Cook, as he says, in the garage and gasoline and oil business. He didn't appear to me to be a frank witness; his evidence didn't appeal to me as being truthful; it didn't appeal to me that he really knew whether he could recognize his own writing or not. I have examined carefully these exhibits, but that is only an opinion of mine. You may have entirely a different one. I think they were all made out at the same time, and at the same place; that is my candid opinion about it. I believe these negroes went down there and paid this money for the purpose of which they stated, in order that they might dispense

liquor out at the parties that they had on various Saturday nights when they had them. Now, that is the way the evidence strikes me, gentlemen; but my opinion is not controlling or in any way binding upon you gentlemen. I am of the opinion that this conspiracy existed as charged in this indictment from this evidence introduced; but that is the deduction that I draw from the evidence which is in no way controlling upon you gentlemen."

In the opinion, reversing the judgment of conviction, in the closing words, it is said (p. 52):

"The argumentative nature of the part of the instructions objected to (hereinbefore set out) is apparent, and in our judgment the language amounted to an argument for the conviction of the defendant. The court did tell the jury that his opinion on the facts was not controlling upon them, but that did not in our judgment cure the error. Every one knows that suggestions from the court have great weight with a jury, and the argumentative language used in this instruction must have seemed to the jury an advocacy of the government's case, and impressed upon them the court's desire for a conviction. We think it was not such judicial discussion of the evidence as is permissible. Certainly the language is as argumentative as that used by the court in the case of Cook v. United States (C.C.A.) 14 F. (2) 833, which this court decided necessitated a reversal of the case.

For the reasons stated, the judgment must be reversed, and the cause remanded for new trial. It is so ordered."

In *Barham* v. *United States*, 14 Fed. (2) 835, 836, the same Court, reversing the conviction, says:

"Plaintiff in error argues that the comments of the court were such as to prevent the defendant from hav-

> ing a fair and impartial trial, and that the court usurped the functions of the jury. The language objected to is that in which the court stated that he drew certain inferences, and expresses the opinion that certain material facts were true, although, as the court says, 'there is no evidence of that.' It is then stated that the court not only did not believe the testimony of a deputy sheriff produced as a witness for the defense, but added that he had no respect and no regard for him, 'and my judgment is, as long as men like him wear a deputy sheriff's commission, why 15 year old girls will be at dances drinking liquor. That is my opinion of his evidence. I don't give it any credence, have no respect for it, but that is only my idea of how his evidence appeals to me. You may look at it entirely different, and that is your business, and your responsibility.'"

In *O'Shaughnessy* v. *United States,* 17 Fed. (2) 225, reversing the conviction, the Court says, at 228:

> "General statements in the charge, to the effect that the jury were at liberty to disregard the Court's views as to guilt or innocence, and to base their verdict on their own conclusions from the evidence, did not cure the fault in the charge of a lack of impartiality in submitting the evidence to the jury, or, justify the court in making one-sided recitals of evidence, or in furnishing arguments in behalf of only one side of issues as to which the evidence was conflicting."

In *Smith* v. *United States,* 18 Fed. (2) 896, where the judge made a statement that he believed a witness told the truth and proceeded to give his reasons, it was held reversible error, as being not within the limits of legitimate judicial comment.

In *Sunderland* v. *United States,* 19 Fed. (2) 202, 216, in reversing a conviction, the Court said:

> "A fair trial means that while the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror."

In *Spalitto* v. *United States,* 39 Fed. (2) 782, 788, in reversing the judgment of conviction, the opinion follows *Cook* v. *United States,* 18 Fed. (2) 50, 52, *supra,* quoting the language already quoted in this brief from that case.

In *Minner* v. *United States,* 57 Fed. (2) 506, in reversing the conviction, one part of the charge was as follows:

> "I also instruct you that the character or reputation of an officer of the government or of this court is not to be impugned because he does his duty. He is presumed to be an honest and conscientious officer, unless there is evidence offered to the contrary, and there was no evidence offered in this case to impeach the character or the reputation of Mr. Madden, or any of the other government officers."

As to this the Court said (p. 513):

> "To thus single out and bolster up the testimony of Madden, upon which the government's case principally depended, was improper and erroneous."

And further the Court said, with reference to the charge of the presiding judge:

> "His comments were in the nature of an argument to the jury rather than a fair and dispassionate statement of what the evidence showed and a tempered expression of his opinion as to the facts. In doing so, he assumed the role of an advocate rather than an impartial judge. That this was error is established by repeated decisions."

In the State Courts of Massachusetts exceptions have been sustained in civil cases where the attorney in argument for a party has made a statement of fact. The statement of an attorney, whose duty it is to be at least partial to his client and his client's case, could have but little effect on the jury in comparison with utterances of the judge, whose function is to instruct the jury and to give the parties a fair and impartial trial. We cite only the latest case in the reports.

In *Doherty* v. *Levine*, 278 Mass. 418, 419, in the opinion by Rugg, C.J., it is said:

> "The statement in argument by the plaintiff's attorney was entirely improper and prejudicial in nature. It was a statement of fact purporting to be on his personal knowledge or at least concerning which the inference well might be drawn that he had personal knowledge. It was a matter concerning which testimony should have been introduced if it was to be considered by the jury." (Citations.)

In Massachusetts the following cases have arisen on the right of the District Judge to comment on the defendant in his charge, and all by Judge Lowell, as follows:

Grillo v. *United States*, 26 Fed. (2) 461. In this case the Court characterized the defendant's testimony. The Circuit Court of Appeals, then made up of Anderson, Bingham, and Johnson, JJ., reversed the lower Court, and said:

> "It appears in the bill of exceptions that the court, having instructed the jury as to the law of the case, said: 'So much for the law. Now, as to the facts. It would serve no useful purpose for me to rehearse them. The defendant took the stand, and the case turns on whether you think he was telling the truth.' We think this statement was misleading. It was made at the very close of the charge. It gave the jury to understand that,

if they did not believe the defendant they could find him guilty. To so charge was a plain error of law. If the jury did not believe the defendant was telling the truth, that would not justify a verdict of guilty. They must go further and find that the defendant entered into a plan or conspiracy with other persons to bring liquor into the country without paying the customs duties and without a permit, and that some overt act was done in furtherance of the conspiracy; and they must be satisfied beyond a reasonable doubt of the proof of these facts. Although the court in the earlier part of its charge outlined what the government was required to prove to establish its case, we nevertheless think that in this parting sentence to the jury it fell far short of what it should have done, and, by so doing, may have misled the jury and excused it from performing its full duty, to the defendant's prejudice."

In *United States* v. *Cohen*, 56 Fed. (2) 28, in reversing the conviction, and quoting from the charge, at p. 30, we find the following:

"'Now this is a very simple question, and it is entirely a question of whether this man Cohen was the man who ran away from that automobile on the 14th of August, 1929. It is entirely a question of fact. Do you believe him, gentlemen? I do not; but it is entirely for you to say. That is all I care to say, gentlemen.' But the issue in the case was not whether Cohen was the man who ran away from the automobile on the 14th of August. It was whether on that date he unlawfully possessed and unlawfully transported intoxicating liquor."

In *Malaga* v. *United States*, 57 Fed. (2) 822, at 828, we find the following statement by the Court in reversing the conviction because of the judge's charge:

"But a statement of facts not in evidence, an argumentative discourse, a repeated assertion that the respondent or other witness is not telling the truth, or a direct or indirect instruction that a respondent in a criminal case is guilty, may not be sufficiently neutralized by a reminder that it is for the jury to say.

That the record before us gives a full and fair picture of what occurred in the trial below, we are reluctant to believe; but we cannot base our conclusions on conjecture, or on what probably occurred. . . .

We think a trial judge should hesitate in expressing his opinion on the guilt of a respondent in a criminal case, though he may be permitted to give his opinion on the evidentiary facts. Argumentative discussion on the effect of evidence as proof, or the inference to be drawn from the acts of witnesses, or of the respondent in a criminal case, are universally recognized as out of place from the bench.

One of the underlying principles of our jurisprudence is that the scales of justice in the trial of a cause must be held in even balance by the presiding judge. It is our pride that under our Constitution and laws a respondent in a criminal case, though guilty, is entitled to a fair and impartial trial."

All three cases were reversed, yet in the instant case, which is far stronger than any one of the three previous cases, we find the majority opinion ignoring two of the Grillo and Cohen cases and not following the Malaga case which is cited, and affirming the conviction.

The three foregoing cases show the progressive stages, from the time when the Circuit Court of Appeals for the First Circuit held as in the Grillo case, *supra,* to the instant case, of the tendency of the District Judge presiding in the criminal session in the District of Massachusetts to ignore the principles of law involved in the offenses charged, and

the necessary elements of the alleged offense to be proved to the satisfaction of the jury beyond a reasonable doubt to justify a conviction, and leave to the jury, as the principal issue to be decided by them, the question of whether or not the defendant was lying, instead of proof beyond a reasonable doubt of the essential elements of the alleged offense. The course so pursued has been insiduous, steady, and progressive, as is clearly illustrated by the charges to the jury in the Grillo case, the Cohen case, the Malaga case, all hereinbefore cited, and the instant case.

II.

The Charge to the Jury was Inadequate.

The defendant contended before the Circuit Court of Appeals, and now contends, that he was entitled to have the judge charge the jury with reference to the essential elements of the offense charged, as to which he seasonably requested specific instructions set forth in the record. The defendant was entitled to have the case submitted to the jury upon the question of whether or not they had been proved beyond a reasonable doubt, and not to have the verdict of the jury turn upon the issue of his veracity.

It is hard to state it any better than in the words of *Grillo* v. *United States, supra:*

> "It gave the jury to understand that, if they did not believe the defendant they could find him guilty. To so charge was a plain error of law. If the jury did not believe the defendant was telling the truth, that would not justify a verdict of guilty. They must go further and find that the defendant" committed the offense charged.

It may be that in the case at bar the jury did not find, and could not have found, that all the essential elements

of the offense charged had been proved beyond a reasonable doubt, and may have reached their verdict because they did not believe the defendant, or may have believed that the defendant was lying because the judge said he believed the defendant was lying, and that it was an indication of lying because the defendant wiped his hands during his testimony.

Such was the law in the First Circuit in the Grillo case, *supra,* and the part of the opinion in the Grillo case hereinbefore quoted seemed to the defendant to be an irresistible argument, and it would have been, had the Grillo case been followed instead of scrapped. The Cohen case, *supra,* is an added authority, and, at the time of the decision of the Cohen case, the Grillo case was apparently being accepted as the law in the First Circuit, from the reasoning of the opinion, although not therein cited. The reasoning is along the same lines.

Conclusion.

And in conclusion it is respectfully submitted that the charge of the presiding judge, ignoring the essential elements of the offense charged, refusing pertinent requests thereto, leaving the issue to depend upon the veracity of the defendant, characterizing the testimony of the defendant as "lying," and adding his own testimony of what he stated to be "the fact" that a man who wipes his hands during his testimony is lying, although we don't know why, went far beyond fair comment, denied the defendant the fair and impartial trial to which he was entitled. And that for these reasons, more fully hereinbefore stated, supported by authorities, the judgment of the Court below should be reversed.

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